

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE
Second Appeal No.449 of 1988

Seva Sadan Education Society

Appellant

Vs.

Shri Pyarelal Ramdeo

Respondent

A.G.Kothari for appellant.

CORAM: B.H.MARLAPALLE, J.

June 19, 2007.

ORAL JUDGMENT

1. This second appeal arises from the decree passed by the learned Civil Judge Junior Division at Ulhasnagar on 7th March 1986 in Regular Civil Suit No.188 of 1977 and duly confirmed by the lower Appellate Court by its judgment and order dated 31st March 1988 by dismissing Civil Appeal No.181 of 1986.

2. The substantial questions of law framed in this Second Appeal while admitting it are as under:

(a) Whether the Courts below were right in assuming the jurisdiction of the Court under the provisions of Section 9 of the Civil Procedure Code and grant the relief of the nature granted to the Respondent - plaintiff

when the Civil Court could not have granted such a relief and entertained the Suit in question?

(b) Whether the Courts below were right in granting the relief of reinstatement to the Respondent - Plaintiff when the relationship between the parties is governed by giving contractual obligations and when remedy of reinstatement is not permissible save and except where the relations are governed by a statute and that being not the position in the instant case whether the Courts below were right in granting the relief of reinstatement and also continuation of service, salaries and other reliefs?

(c) When it has been held succinctly that the Secondary Schools Code is not the Statutory Code and when it has been held that the relationship between the master and servant regarding employment cannot be governed by the Secondary Schools Code and the remedy of dismissed employee lies only of the suit for relief of damages and in no

circumstances the relief of reinstatement can be granted, whether the Courts below ere right in granting the relief as prayed for to the respondent - plaintiff?

(d) Whether the Courts below were right in holding and / or coming to the conclusion that in the instant case the Civil Court could grant relief asked for and could entertain the relief of the nature granted to him and that he should get declaration as well as pay allowances right from the date of suspension?

(e) When it is an admitted position that the Management did not allow the respondent - plaintiff to resume and/or come to the office of the Management and work and when he was specifically prevented from attending the duties, as evidenced from correspondence right from Exhibit 33 to Exhibit 43, whether the Courts below were right in assuming and/or proceeding on the footing that the services of the respondent-plaintiff were not snapped and/or terminated and secondly whether they could hold and declare that the said

termination was illegal in the absence of
 there being any statutory condition preventing
 the Management from doing so and in any case
 the remedy of the respondent - plaintiff lay,
 if at all any, implicit or by way of claiming
 damages only?

3. Few admitted facts are required to be stated
 before proceeding to consider the substantial
 questions of law as framed hereinabove. The
 defendant - appellant is a Public Trust registered
 under the provisions of the Bombay Public Trusts Act,
 1950 and is running a school under the name and style
 "New Era High School" at Ulhasnagar and the said
 school was recognised by the Government of
 Maharashtra. It was an aided school and the
 plaintiff was employed by the school as a Peon with
 effect from 1/2/1969. He was a confirmed employee.
 Around 8th December 1975 the Principal of the School
 got a report that the plaintiff was keeping under
 lock and key some lady in the room allotted to him in
 the school premises and, therefore, some
 investigation was done and on 17th December 1975 the
 Principal suspended him pending further enquiry (Exh.
 53). It is also pertinent to note that the plaintiff

had claimed that he was married in April 1975 and, therefore, he had asked for a family quarter. Out of the five quarters one quarter was available and on the plaintiff furnishing the details like the name of his wife etc., the same was allotted to him. He had furnished his wife's name as Kamala. The preliminary investigations made by the Principal based on the statements of the Peons who were asked to go and visit the quarter of the plaintiff indicated that there was a lady in the quarter allotted to the plaintiff and she was not his wife and on the contrary she was a girl who was purchased by the plaintiff from one Nanelal Chowkidar for a sum of Rs.200/- to 500/-. In this process the Principal recorded statements of Fulchand, Radheshyam and Ratansingh (Exhibits 50 to 52). While issuing the suspension order the plaintiff was asked to come for the enquiry in the school on 21/12/1975. The plaintiff refused to accept the said suspension order and did not turn up for the enquiry. The enquiry was adjourned from time to time and on completion of the said enquiry, report was sent to the Education Officer who by his letter dated 5/9/1976 (Exhibit 54) informed that the proposal sent by the Management was referred to the higher authorities.

4. While the Management's further action was pending the plaintiff filed Regular Civil Suit No.188 of 1977 on or about 19th August 1977 for a declaration that the termination of his service was wrongful, illegal, unlawful, improper, unjustified and for consequential reliefs.

5. The appellant-defendant filed its Written Statement at Exhibit 21 and pointed out that there was no termination of service and the plaintiff was only suspended as per the order dated 17/12/1975. He did not attend the enquiry and never appeared to report to the school and, therefore, it was contended that he had abandoned the service voluntarily. It was also pointed out that within few days of his suspension the plaintiff was employed in M/s. Gurbax & Co. which is located just in front of the school premises and at the time when the W.S. was filed the plaintiff was already working in Seva Niketan Hospital. The plaintiff stepped in the witness box in support his case whereas the Management examined three witnesses i.e. PW 1 - Hari Bhamban, who was the Principal of the school, PW 2 - Tulsiram Wani, an officer from the Education Department in Zilla

Parishad, Thane and PW 3 - Kashinath Umbarkar, a medical practitioner.

6. After considering the evidence placed on record by both the parties and the rival submissions made, the learned Judge of the trial Court decreed the suit as under:

"It is hereby declared that the Termination or discontinuation of the plaintiff from the service by the Defendant is illegal, unlawful, unjustified and against the Rules of natural justice.

It is further declared that the plaintiff still now continues to be in the service of the defendant.

The defendant is hereby directed to forthwith reinstate the plaintiff in the service and if for some reasons he cannot be reinstated the defendant shall continue to pay full pay to the plaintiff.

The defendant is directed to pay Rs.5500/-

from 19/12/1975 till the filing of the suit with 9 % p.a. interest on this amount.

The defendant is also directed to pay full pay and allowances from the date of suit till today as are admissible to the plaintiff as per the rules.

The defendant is also directed to pay costs of the suit to the plaintiff while bearing its own."

7. The lower Appellate Court did not agree that the plaintiff's case was that of termination. On the contrary it held that the plaintiff was suspended and he remained suspended till he filed the suit. The lower Appellate Court held that the suspension was illegal on account of breach of Rule 33 of the MEPS Rules, 1981. It further held that the Civil Court had jurisdiction to try the suit and the plaintiff was entitled for a declaration that the order of suspension was illegal. In spite of these findings the lower Appellate Court thought it fit to confirm the decree passed by the trial Court. The view taken by the lower Appellate Court has not been challenged

by the plaintiff either by way of an independent appeal or cross-objection before this Court and, therefore, it is implied that the plaintiff accepted the finding of the lower Appellate Court that he was not terminated from service and on the contrary he was suspended pending the enquiry.

8. Though the MEPS Act, 1977 was enacted when the cause of action arose for the suit or when the suit was filed by the plaintiff, the said Act was brought into force only from 16th July 1981 when the MEPS Rules, 1981 were framed. It has to be, therefore, held that neither the said Act nor the Rules framed thereunder were applicable to the plaintiff to challenge the suspension order or to challenge the alleged illegal termination of service. In the S.S. Code also, there was no remedy to challenge the suspension order and an appeal could have been filed before the Dy. Director of Education against the suspension order. When such a statutory remedy was not available, there was no implied bar for filing a suit for a declaration that the termination or the order of suspension was illegal and void ab initio and also to seek an injunction restraining the Management from keeping him away from performing his

duties as a Peon. Therefore, the issue regarding maintainability of the Suit has to be answered against the Management i.e. the present appellant.

9. Rule 35 of the MEPS Rules, 1981 reads as under:

"In case where the Management desires to suspend an employee, he shall be suspended only with the prior approval of the appropriate authority mentioned in Rule 33."

The lower Appellate Court, as noted earlier, held that the suspension was in breach of Rule 33 read with Rule 35 of the MEPS Rules, 1981 but the MEPS Act, 1977 as well as the Rules framed thereunder were not in force on the day when the suit was filed and, therefore, the view taken by the lower Appellate Court holding the suspension order to be illegal, inoperative or unjust is patently erroneous.

. Rule 77.3(2) of the Secondary Schools Code, which was in fact applicable regulating the service conditions of the employees in private schools at the relevant time, reads as under:

"The Management may suspend an employee during the course of inquiry and if this is done the employee shall have to be given full pay and allowances, if any, during the period of suspension."

. The Secondary School Code thus empowers the Management to suspend an employee during the course of enquiry and it was necessary that during the period of suspension such an employee was given full pay and allowances. In the instant case the plaint is silent as to whether the plaintiff was being paid the subsistence allowance or full pay. The plaintiff claimed that he was stopped from reporting to duty from 17th December 1975 and, therefore, it was a case of oral termination of service which allegation did not find favour with the lower Appellate Court. The scheme of the Secondary School Code does not specify the duration for which the employee could remain under suspension. The evidence placed before the trial Court by the Management through its Principal indicated that the enquiry was completed within about six to eight months and proposal was submitted to the Education Officer and it remained pending with the

the said authority. Before the Management could decide the further course of action, the plaintiff appears to have approached the trial Court in the suit. Under these circumstances, there is no reason to hold the suspension order to be illegal and if it is presumed for some time that the Management was not paying subsistence allowance or the full salary, the plaintiff had a remedy to recover the same. Failure to pay the salary by itself may not be a reason to hold that the suspension was illegal more so when it was the case of the employer that within few days of the suspension order the plaintiff was gainfully employed next door. In his cross-examination though the plaintiff denied to have been employed with M/s.Gurbax & Co., he admitted that he was in the employment of Seva Niketan Hospital and he was employed there immediately after the hospital was started. The evidence of the Principal remained in tact about the plaintiff's employment under M/s. Gurbax & Co. which was located opposite the very same school gate. Even otherwise, the Management was justified to suspend the plaintiff, having regards to the seriousness of the report received by the Principal, that the plaintiff had purchased a girl and was keeping her locked in the house in his

absence. She was not his wife.

10. Though the Civil Court in a suit for declaration and injunction has powers to grant such a relief, in Service Rules the consequential relief like reinstatement or damages cannot be granted in case of termination of service and the reliefs to be granted are normally based on the terms and conditions of the appointment or the service rules, if any. If the appointment order says that for termination of service a notice of one month or three months is required to be given and if the notice was not given, while giving declaration of the order being illegal, the Court may direct to make the payment of the notice period but the Civil Court has no powers of directing reinstatement in service. This position in law is well settled. A three-Judge Bench in the case of *Nandgani Sihori Sugar Co. Ltd. Vs. Badri Nath Dixit* [**AIR 1991 SC 1525**] held in para 10 as under:

"A contract of employment cannot ordinarily be enforced by or against an employer. The remedy is to sue for damages. (See Section 14 read with Section 41 of the Specific Relief Act; see *Indian Contract and Specific Relief Acts* by Pollock & Mulla, Tenth Edn., page 983). The grant of specific performance is purely discretionary and must be refused when not warranted by the ends of justice. Such relief can be granted only on sound legal

principles. In the absence of any statutory requirement, Courts do not ordinarily force an employer to recruit or retain in service an employee not required by the employer. There are, of course, certain exceptions to this rule, such as in the case of a public servant dismissed from service in contravention of Article 311 of the Constitution; reinstatement of a dismissed worker under the Industrial Law, a statutory body acting in breach of statutory obligations, and the like...."

. The abovesaid view was subsequently followed in the case of Integrated Rural Development Agency vs. Ram Pyare Pandey [1995 Supp (2) Supreme Court Cases 495]. In view of this well settled legal position, the lower Appellate Court fell in error in confirming the decree passed by the trial Court. The lower Appellate Court passed a decree holding that the suspension order was illegal and void ab initio and could have also granted an injunction against the Management restraining it keeping the plaintiff under suspension or keeping him away from his ordinary duties. The relief of reinstatement or the damages etc. could not have been considered in the instant case. Under these circumstances, though the view taken by the lower Appellate Court that the Management had suspended the plaintiff, its finding that the suspension was illegal is unsustainable and

it also fell in manifest error in confirming the
decree passed by the trial Court.

11. In the result this Second Appeal succeeds and
the same is hereby allowed. The impugned decree is
hereby quashed and set aside. Rule 73.3(2) of the
Secondary Schools Code makes it obligatory on the
part of the Management to pay full salary for the
period of suspension in case the suspended employee
remained unemployed. The Management is, therefore,
directed to pay full salary for the period of
suspension of the plaintiff and to the extent that he
was not employed in any other establishment.

(B.H.MARL